PRIVY COUNCIL REPORT.

[PRIVY COUNCIL]

LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SIDNEY ROWLATT & SIR GEORGE RANKIN.

MARCH 7, 1938

AHMED ANGULLIA BIN HAJEE MOHAMED SALLEH ANGULLIA

v.

ESTATE AND TRUST AGENCIES (1927) LTD., & OTHERS.

[PRIVY COUNCIL APPEAL No. 124 of 1936]

Administrators and Executors—testator's contract—payments made by executor on such contract—subsequent revocation of probate—executor's duty to honour deceased's contractual obligations.

On 3rd January 1927 M. Y. conveyed certain lands to his wife and himself upon trust for himself for life and after his death upon trust for his son K. E. if he should attain the age of twenty-one years and in default upon trust in favour of his wife and daughter.

In July 1927 M. Y. entered into a contract with a building contractor for the erection of six shop houses on part of the settled land at a cost of $44,572.00.

In July 1928 M. Y. died leaving a will. The will was proved by the appellant. At the date of M. Y.'s death the contractor had completed about three quarters of the work and had been paid over $28,000.00 of the contract price leaving a balance due of some $16,000.00 partly represented by work completed but not paid for at M. Y.'s death and the balance subject to the due performance of the contract. The Appellant acting as the executor of the will of M. Y. paid $17,276.00, the sum due to the contractor, who had in the meantime completed the contract. In order to provide this sum the appellant as executor mortgaged certain properties belonging to the estate of M. Y. and paid by way of interest on the amount borrowed the sum of $3,702.96.

In January 1932 the alleged will was set aside and the probate in favour of the appellant was revoked by Order of Court on the ground that the will had not been properly executed. At the same time the Court appointed Estate and Trust Agencies (1927) Limited administrator of M. Y.'s estate. In the administration proceedings commenced for the administration of M. Y.'s estate the appellant in his accounts filed in Court credited himself with the two sums of $17,276.00 and $2,702.96 as being properly payable out of the estate and on an objection by the other parties to the proceedings to the appellant being allowed the said two sums in his accounts the Registrar referred the question to the Judge for determination. The Judge directed the Registrar to disallow in the appellant's account the item of $17,276.00 except so much out of it as it would have been fair to pay the contractor as compensation for the breach of contract if the contract had been broken at M.Y.'s death and disallowed so much of the sum of $3,702.96 as represented interest on the part of the above sum disallowed. The appellant appealed to the Court of Appeal and that Court dismissed the appeal with costs.

Held, that it was the duty of the appellant as M.Y.'s apparent legal personal representative to honour M.Y.'s obligations under the contract unless any other arrangement could have been made with the contractor which would have been of advantage to the estate that he was administering. The onus of proving that such arrangement could have been made lay upon the respondents. The appellant could not in the circumstances have prevented the contractor from completing the contract had the latter wished to do so, for the land on which the shop houses were being erected was the land of K. E., nor would he have benefited the estate by repudiating the contract unless the contractor accepted such repudiation which was unlikely and in any case he owed no duty to the estate that he was administering to commit such an unlawful act. The appellant was therefore entitled to credit himself in the estate accounts with the amounts disallowed.

Cooper v. *Jarman*, 3 Eq. 98 followed and explained.

In re Day; *Sprake* v. *Day*, (1893) 2 Ch. 510 distinguished.

The decision of the Court of Appeal of the Straits Settlements reported in (1936) M.L.J. 97; (1936) S.S.L.R. 28, overruled.

A. F. Topham, K.C. and *J. Leonard Stone* for the Appellant.

C. D. Myles and *H. E. Francis* for the Respondents.

The judgment of their Lordships was delivered by—

LORD ROMER,—This appeal raises an interesting question as to the duties of an executor in relation to the testator's contracts remaining uncompleted at his death.

The facts that give rise to it are, so far as material, as follows. On January 3, 1927, Kavena Hadjee Mohamed Yoosuf hereinafter referred to as the intestate conveyed certain lands in Singapore to his wife the respondent Fatimah and himself upon trust for himself for life and after his death upon trust (subject to certain provisions as to maintenance) for his son the respondent Kader Ebrahim if he should attain the age of 21, and in default, upon trust for the said son's children as therein mentioned with an ultimate trust in favour of the intestate's said wife and a daughter. On July 15, 1927, the intestate entered into a contract with one Tan Peck Hood, a building contractor, which provided (as subsequently modified) for the erection on part of the settled land of six shops at a cost of $44,572. Hood proceeded with the work and had completed about three-quarters of it, when on July 18, 1928, the intestate died. At that time Hood had been paid over $28,000 of the contract price and a balance of some $16,000 accordingly remained due to him subject to his due performance of the contract. Their Lordships have no precise information as to how much of the $16,000 represented work completed but not paid for at the death of the intestate. As, however, three-quarters of the work had been done, about $5,000 out of the $16,000 would appear to have already been earned by the contractor. After the death of the intestate a document

which purported to be his will and which was dated May 25, 1928, was admitted to probate, probate being granted on September 10, 1928, to the appellant who had been thereby appointed the sole executor. The appellant proceeded to administer the intestate's estate, and in his capacity of executor paid $17,276 to Hood, who had in the meantime completed the erection of the six shops. It is not disputed that this was the sum due to Hood upon such completion. In order to provide this sum, the appellant as executor mortgaged some property forming part of the intestate's estate, and in respect of such mortgage a sum of $3,702.96 was paid by the appellant by way of interest.

On January 7, 1932, probate of the alleged will was revoked by order of the Court on the ground that the same had not been properly executed, and thereupon the respondents Estate and Trust Agencies (1927), Limited. were appointed administrator of the intestate's estate. Such respondents are hereinafter referred to as the Administrator.

On May 16, 1934, the Administrator issued an originating summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) for the determination of the question whether the sum of $17,276 paid to Hood ought to be borne by the settled property, or ought to be paid out of the intestate's estate, and asking for general administration of such estate so far as might be necessary. The summons came on for hearing before Prichard, J. who declared that the cost of completing the six shops ought to be paid out of the settled property and made an order for the administration of the intestate's estate including an account in the usual form of the intestate's personal estate come to the hands of the appellant. The respondent Kader Ebrahim appealed to the Court of Appeal from so much of this order as declared that the settled estate should bear the costs of completing the six shops, and such appeal was allowed, the Court declaring that such costs were not recoverable out of the settled properties without prejudice to any question that might arise as to how such costs should be borne as between the present appellant and the intestate's estate.

Neither in the order of Prichard, J. nor in that of the Court of Appeal does any distinction appear to have been drawn between the cost of the work done on the shops after the death of the intestate and the cost of that done but not paid for in his lifetime; and it must be taken that the costs referred to in the two orders consisted of the whole of the $17,276 and the $3,702.96 interest.

The appellant's account of the intestate's estate come to his hands was in due course brought in before the Registrar of the Court, and in that account the appellant credited himself with the two sums in question as being properly payable out of the estate. The administrator and the next of kin objected, and thereupon the Registrar pursuant to 0.51, r. 20 of the Rules of the Supreme Court, 1934, referred the question to the Judge for determination.

The reference came on for hearing before Burton (acting) C. J. and he by an order dated October 10, 1935, directed the Registrar to disallow in the appellant's account the $17,276 except so much of it as the Registrar should consider would have been fair to pay to Hood as compensation for the breach of the contract to build the shops if the contract had been broken at the death of the intestate, and also to disallow so much of the $3,702.96 as represented interest upon such part of the $17,276 as was directed to be disallowed. He further ordered the appellant to pay the administrator's costs of this reference, and also those of the five other respondents to this appeal, such respondents being the persons entitled beneficially to the property of the intestate.

In support of his claim to be allowed the whole of the two sums in question, the appellant relied upon the decision of Lord Romilly in the case of *Cooper* v. *Jarman*, (1855) 3 Eq. 98. That case, in some respects, bears so close a resemblance to the present one that it must be examined in some detail. The facts were these. An intestate had entered into a contract with some builders for the erection of a house on some freehold land belonging to him. At the time of his death the house was in course of erection but had not been finished. Letters of administration were in due course granted to two of his children. one of whom happened to be his heir-at-law. The house having been completed by the builder after the intestate's death, the heir-at-law, as one of the intestate's legal personal representatives, paid to the builder out of the intestate's personal estate the cost of such completion. According to the headnote of the report, it was held that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. In point of fact Lord Romilly held nothing of the sort. It had, indeed, been laid down in the case of *Holt* v. *Holt*, 2 Vern. 322, that the heir-at-law had such a right in the like circumstances, though on what grounds the decision in that case was founded is not at all apparent. It is true, too, that the case of *Holt* v. *Holt* (*supra*) was cited in the arguments on behalf of the heir-at-law in *Cooper* v. *Jarman* (*supra*). But the question in the last-mentioned case was whether the heir-at-law, in his capacity of legal personal representative of the intestate, ought to be allowed in taking the account of the

personal estate come to his hands, the cost of completing the house. The decision was in favour of the heir-at-law, but it was not in any way based upon any rights he possessed as heir-at-law. The case of *Holt* v. *Holt* (*supra*) is not even mentioned in Lord Romilly's judgment. His judgment was based solely upon the rights and duties of a legal personal representative in such circumstances, and would have been precisely the same if the heir-at-law had not himself been one of the administrators of the intestate. It had been argued that the duty of the administrator was to commit a breach of the contract entered into by the intestate, inasmuch as it was one of which equity would not have decreed specific performance, and to pay the builder the damages occasioned by that breach. Lord Romilly would have none of this.

> "It cannot be good law," he said, "that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate."

He then rejected the contention that the duty of a legal personal representative in this connection depends in any way upon the question whether the contract is or is not one of which specific performance can be enforced, and proceeded as follows:—

> "It cannot in my opinion be law that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. Laurence" (the builders in question) "and hinder them from coming on his land and prevent them from completing the contract because, in the opinion of the next-of-kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract."

He then, pointed out that in any case the administrator if he paid the contractor damages without suit might be charged by the next of kin with having paid more than a jury would have awarded, and that if he went to law the amount of damages found by the jury together with the costs of the suit might exceed the cost of completing the contract, and he concluded as follows:

> "The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct, it is to perform the contract entered into by his intestate. The legal duty in this instance, as I believe it is in all cases where it is fully understood and examined is identical with the moral duty."

All of which appears to their Lordships to be both good law and good sense. *Prima facie* it is the duty of a legal personal representative to perform all contracts of his testator or intestate as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason such as the Statute of Frauds and is one that it would be disadvantageous to the estate to perform, it is a different matter (see *In re Rownson*, (1855) 29 Ch. D. 358; though it seems to be settled that he is not bound to plead the Statute of Limitations and may pay a statute-barred debt unless it has been judicially declared to be so [see *In re Midgley*, (1893) 3 Ch. 282]. Nor in the case of an enforceable onerous contract ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and in their Lordship's judgment it can never be the duty of an executor or an administrator to commit such an act. It is this principle that lies at the root of the decision in *Cooper* v. *Jarman* (*supra*).

Burton, (acting) Chief Justice, however, thought that *Cooper* v. *Jarman* (*supra*), was distinguishable from the present case in that Kader Ebrahim was not the heir-at-law of the intestate. He was, said the learned Chief Justice, a stranger to the intestate's estate and unlike the heir-at-law in *Cooper* v. *Jarman* (*supra*) had no claim to have the contract carried out. In saying this he seems to have been misled by the headnote in that case, and failed to notice that the decision in no way turned upon any rights the heir-at-law might possess but solely upon the rights and duties of the administrator. He also thought that he was warranted in refusing to follow *Cooper* v. *Jarman* (*supra*), by the decision of North, J. in *In re Day, Sprake* v. *Day* (1893) 2 Ch. 510. It cannot be denied that this latter decision fully justified the statement of the Acting Chief Justice that Kader Ebrahim had no claim to have the intestate's contract with the builder carried out. But it is no authority for the proposition that the cost of completing it was not proper to be allowed to the appellant in taking his account. The facts of that case were substantially as follows. A testator by his will had devised certain land to his wife for life. Shortly before his death he had entered into a contract with some builders for the erection of some cottages on the land. He had also entered into a contract with the same builders for the erection of a house on some land that belonged not to his wife in her own right. At the time of his death neither of these contracts had been completed, and after his death his executors prevented the builders from finishing the work. The wife thereupon claimed to be entitled to have the two contracts completed at the cost of the testator's personal estate. North, J. acceded to the wife's

claim in respect of the first contract but rejected it in respect of the second. He thought that *Cooper* v. *Jarman* (*supra*) was an authority in her favour so far as the land devised to her was concerned, treating a devisee as being in the same position as an heir-at-law. If no distinction is to be drawn between a devisee and an heir-at-law for this purpose, *Holt* v. *Holt* (*supra*), was no doubt an authority in favour of the learned Judge's decision. But with all respect to him and for the reasons already given, *Cooper* v. *Jarman* (*supra*), was not. As to the second contract, he held that the wife being a stranger to the testator's estate had no right to have it carried out at the expense of his personal estate. Whether *In re Day, Sprake* v. *Day* (*supra*), was rightly decided or not is a question upon which it is unnecessary for their Lordships to express any opinion. It is sufficient to say that it has no bearing upon the present case.

An appeal from the decision of the Acting Chief Justice was taken to the Court of Appeal, and in due course came before Huggard, C.J., Whitley and Terrell, JJ., who, by order dated the January 18, 1936, dismissed the appeal with costs. They were unanimous in holding that the appellant could not be allowed the two payments in question. Before considering the reasons given by them for the decision, reference must be made to an argument advanced before them by the appellant which was in the nature of a preliminary objection. He contended that the items relating to the erection of the shops could only be disallowed on the footing that a breach of trust had been committed by the appellant, and that as a breach of trust on his part had not been specifically pleaded, he could not be charged with one in taking the ordinary account of the personal estate of the intestate come to his hands. This contention was rejected by the Court of Appeal and in their Lordships' opinion was rightly rejected. In taking the account the appellant could not, of course, be charged with damages occasioned to the estate by a breach of trust. But it was incumbent upon him to justify his payments, and those that he could not justify would necessarily have to be disallowed. As was said by Chitty, L. J. in *In re Stevens*, (1898) 1 Ch. 162 at p. 172; 67 L. J. Ch. 118:—

> "On taking the common account of their receipts executors can properly be, and are often, charged with a *devastavit* arising on the accounts themselves. On taking the account they stand charged with their receipts; and if they seek to discharge themselves by unlawful payments, their discharge is disallowed."

Turning now to the reasons given by the learned Judges in the Court of Appeal for thinking that the two sums in question ought to be disallowed as being unlawful payments, their Lordships find that the Chief Justice and each of his learned colleagues considered the case to be covered by the decision of North, J. in *In re Day, Sprake* v. *Day* (*supra*), a decision which was not, of course, binding upon them but was one from which they said they were not prepared to dissent. The Chief Justice in referring to *Cooper* v. *Jarman* (*supra*) said this:—

> "It was held by Lord Romilly that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. Now when one reads the judgment of Lord Romilly in that case it would appear to support strongly the appellant's contention in the present case. But Lord Romilly's judgment was considered in the later case of *In re Day, Sprake* v. *Day* (*supra*) and it is clear from the decision of North, J. that Lord Romilly's observations in *Cooper* v. *Jarman* (*supra*) must be read in the light of the facts of that particular case."

He then referred to the facts in *In re Day, Sprake* v. *Day* (*supra*), and the reasons there given by North, J. for distinguishing between the two contracts in that case and proceeded as follows:—

> "It appears to be clear from the decision in *In re Day, Sprake* v. *Day* (*supra*) that the distinction drawn by North, J. between the two contracts was based on the fact that one property belonged under his will, whereas the other property....belonged to a stranger. In other words, in one case the completion of the contract benefited the estate of the testator; in the other case there was no such benefit. In the former case the decision in *Cooper* v. *Jarman* (*supra*), therefore, applied; in the latter it did not. The test to be applied in each case is whether the completion of the contract is for the benefit of the deceased's estate."

The judgments of Whitley, J. and Terrell, J. proceeded upon the same line of reasoning, and upon the same view of the cases of *Cooper* v. *Jarman* (*supra*) and *In re Day, Sprake* v. *Day* (*supra*). They also thought that they found in those two decisions authority for the proposition that in such a case as the present the test to be applied is whether the completion of the contract is for the benefit of the estate of the intestate. Applying that test the Court very naturally dismissed the appeal. It was impossible to say upon the evidence that the estate of the intestate was benefited by the completion of the shops.

Their Lordships are unable to agree that the test to be applied is that adopted by the Court of Appeal. If the appellant were seeking to justify the two payments on the ground that

Kader Ebrahim had a right to have the contract for the erection of the shops completed at the cost of the intestate's estate, the decision in *Cooper* v. *Jarman* (*supra*), would not assist him, and the decision in *In re Day, Sprake* v. *Day* (*supra*), as regards the second contract in that case, would be an authority against him. But the appellant does not seek to justify the payments on any such ground. He merely seeks to justify them on the grounds stated by Lord Romilly in *Cooper* v. *Jarman* (*supra*), the headnote in which case would seem to have misled the Court of Appeal just as it had misled the Acting Chief Justice in the Court below.

In their Lordships' judgment it was the duty of the appellant as the apparent legal personal representative of the intestate to honour the intestate's obligations under the contract in question unless an opportunity presented itself of coming to some arrangement with the builder that would be of advantage to the estate that he was administering. There is no evidence that any such opportunity did in fact present itself, and the onus of proving the existence of such an opportunity lay, in their Lordships' opinion upon the respondents. Burton (acting C. J.) no doubt in the course of his judgment said that the contractor would have been perfectly satisfied with a sum sufficient to compensate him for loss of expected profits and that he would have been satisfied by a payment which must have been substantially less than the $17,276 paid to him. But in making these observations, the learned Judge would appear to have been merely hazarding a guess; for there was no evidence before him as to the intentions or desires of the contractor. If a guess is to be indulged in, it would seem more probable that the contractor would have preferred to complete the contract. For apart altogether from any loss to his reputation by leaving the shops in an unfinished state, the sudden breaking off of the work might have involved the temporary unemployment of members of his staff and the loss of the building material already on the site, seeing that he would have had no right as against Kader Ebrahim to enter upon the land for the purpose of removing it. And even if he had been willing to agree to leave the work unfinished upon the terms of being paid compensation, all such matters would have come into his calculations, and there seems no reason to suppose that he would have been content to receive merely his loss of profit or any sum less than the amount actually paid to him by the appellant. Nor could the appellant have prevented the contractor from completing the contract if the contractor wished to continue the work, for the land on which the shops were being erected was the land of Kader Ebrahim. Had, therefore, the appellant purported to repudiate the contract, he would not have benefited the estate unless the contractor accepted such repudiation which seems unlikely; and if the contractor had accepted such repudiation and sued the appellant for damages, it is impossible to tell how much such damages together with the costs of the action would have amounted to. But in any case, the appellant owed no duty to the estate that he was administering to commit the unlawful act of repudiating the contract, and he is not shown to have had any opportunity of coming to a friendly arrangement with the contractor that would have been more beneficial to the intestate's estate than paying the balance of the contract price unpaid at the intestate's death.

Their Lordships are accordingly of opinion and will humbly advise His Majesty (1) that the appeal should be allowed and the orders of October 10, 1935, and January 18, 1936, should be discharged; and (2) that the Registrar should be directed to allow in the appellant's account the sums of $17,276 and $3,762.96.

As regards the costs, the order should be as follows:—(1) that the respondents ought to pay to the appellant his costs as between party and party on the higher scale, of the hearing before Acting Chief Justice Burton on October 10, 1935, and before the Court of Appeal on January 18, 1936; (2) that all costs already paid by the appellant under those orders ought to be repaid to him by the respondents, respectively; (3) that the costs of the appellant of the order of September 25, 1935, and his costs made costs of the cause by order of the Supreme Court dated August 28, 1936, ought to be paid and dealt with in all respects in the manner herein directed with reference to the costs of this appeal; (4) that the costs of the appellant as between solicitor and client on the higher scale of the hearing of October 10, 1935, and in the Court of Appeal on January 18, 1936, and of this appeal hereinafter referred to after giving credit for the party and party costs ordered to be paid by the respondents and recovered by him from the respondents in these proceedings ought to be his costs in the cause; (5) that this order ought to be without prejudice to any claim of the respondents or any of them to be allowed their costs of all the above mentioned proceedings out of the estate of the intestate; (6) the appellant's costs of this appeal as between party and party will be paid by the respondents.

Appeal allowed.

Solicitors for the Appellant—
Messrs. Emmett & Co.

Solicitors for the Respondents—
Messrs. Peacock & Goddard.